Supreme Court, U.S.
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No. 92-1433

In the Supreme Court of the United States

OCTOBER TERM, 1992

EDWARD G. WALLACE, JR., ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly relied on the Texas parol evidence rule to bar the use of affidavits as summary judgment evidence to establish the invalidity of a written agreement.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 975 F.2d 227. The opinion of the district court (Pet. App. I1-I8) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 1992. The petition for a writ of certiorari was filed on January 19, 1993 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1984, petitioner Edward G. Wallace, Jr., executed a $4 million promissory note payable to Continental Illinois National Bank (Continental).

Petitioner Republic Mineral Corporation (RMC) guaranteed Wallace's obligation under the note. After the note was extended on three occasions, it finally became due and payable on April 1, 1987. Wallace failed to pay the note at that time. Continental conveyed the note and guaranty to the FDIC on April 14, 1987. The FDIC filed this suit against petitioners on the note and guaranty on October 30, 1987. See Pet. App. A2, H2.

On November 30, 1987, the parties executed several documents—referred to collectively as the forbearance agreement—under which the FDIC agreed to stay its lawsuit until June 1, 1988, to allow Wallace additional time to pay the debt. Pursuant to the forbearance agreement, petitioners reaffirmed their obligations under the note and guaranty, delivered into escrow deeds to certain real property as security for payment of the note, and executed a release of all existing claims against the FDIC and Continental. Pet. App. A2.

Wallace failed to pay the note by June 1, 1988, as the forbearance agreement required. Accordingly, the FDIC reinstated the lawsuit and on June 3, 1988, filed a motion for partial summary judgment, relying on the admissions and release in the forbearance agreement. Petitioners filed counterclaims alleging that Robert Brooks (an FDIC employee) fraudulently induced them to execute the forbearance agreement by assuring them that the note would be extended again on June 1. Petitioners supported the counterclaims with affidavits signed by Wallace, Brooks, and another officer of RMC. The FDIC responded by arguing that the Texas parol evidence rule barred

consideration of the affidavits. See Pet. App. A2-A3, B1-B6, E1-E7, F1-F2, G1-G4.

2. The magistrate recommended that the FDIC's motion for summary judgment be denied. Pet. App. H1-H5. The magistrate stated that applicable Texas law would permit the introduction of parol evidence where there was a showing of "some trickery, artifice, or device," and therefore concluded that summary judgment was not appropriate. *Id.* at H3-H4.

3. The district court rejected the magistrate's recommendation and granted summary judgment for the FDIC. Pet. App. I1-I8. The court explained that under *Town North National Bank* v. *Broaddus*, 569 S.W.2d 489 (Tex. 1978), affidavits are admissible to show fraud in the inducement of a promissory note only if there is some showing of trickery beyond a statement that the makers of the note would not ultimately be liable. Because the alleged representation here—that further extensions would be available—did not establish trickery any more than the statements at issue in *Broaddus*, the court concluded that summary judgment was appropriate for the FDIC as holder of the note. Pet. App. I7.[1]

4. The court of appeals affirmed. Pet. App. A1-A8. Noting that Texas law was applicable under the terms of the forbearance agreement, *id.* at A4 n.3, the court examined the Texas parol evidence rule. The court explained that under *Broaddus*, a party may introduce parol evidence to vary the terms of a contract if

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[1] The opinion discussed in the text did not completely dispose of all claims. The remaining two issues were resolved by two subsequent orders of the district court reprinted at Pet. App. J1-J3, K1-K4.

it is designed to show fraud in the inducement to enter the contract. The court also explained, however, that the Texas Supreme Court has construed the fraud exception to the parol evidence rule quite narrowly in cases involving promissory notes, requiring the maker of the note to "make a preliminary showing that the payee used 'some type of trickery[,] artifice, or device . . . in *addition* to the showing that the payee represented to the maker he would not be liable on such note.'" Pet. App. A5 (quoting *Broaddus*, 569 S.W.2d at 494 (emphasis added by court of appeals)).

The court then turned to its decision in *Rosas* v. *United States Small Business Administration*, 964 F.2d 351, 355-356 (5th Cir. 1992), in which it had suggested that the *Broaddus* requirement was applicable not only to promissory notes, but also to guarantee agreements. Based on that decision, the court reasoned that the "trickery" requirement applies to "the whole negotiable instrument context, not merely the making of a promissory note." Pet. App. A6.

Finally, the court of appeals affirmed the district court's determination that petitioners failed to make the required showing of trickery. Pet. App. A7-A8. The court concluded that "[a]lthough the issue of whether trickery actually occurred is a question of fact, determining whether the maker of a note has made the requisite preliminary showing of trickery in order to present his fraud evidence to the fact finder is a question of law." *Id.* at A7-A8. Otherwise, the court reasoned, a preliminary jury trial on the sole issue of trickery would be required before the

merits of a summary judgment motion could be resolved. *Id.* at A8 n.7. The court concluded that petitioners had come forward with no evidence that the FDIC employed any trickery and accordingly affirmed the district court. *Id.* at A8.

ARGUMENT

Petitioners challenge the decision of the court of appeals on five separate grounds, but do not attempt to overcome the court's understanding of the Texas parol evidence rule. Because petitioners implicitly accept the court of appeals' understanding of the Texas law at issue, there is no basis for review by this Court of the judgment of the court of appeals.[2]

1. Petitioners first contend (Pet. 5) that the district court erred in applying "state rules of procedure" to determine whether summary judgment was proper under Rule 56(c), Fed. R. Civ. P. That claim is meritless. The court of appeals concluded that summary judgment was appropriate because, applying the substantive law of the State of Texas—in this case, the parol evidence rule—there was no genuine issue of material fact. Petitioners do not identify any court that has treated the parol evidence rule as a procedural rule not binding on federal courts in cases where state substantive law applies. In fact, the courts of appeals consistently have applied state parol evidence rules in similar circumstances. See, *e.g.*, *Childers Oil Company* v. *Exxon Corporation*,

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[2] Even if petitioner did challenge the view of Texas law adopted by the district court and the court of appeals, that question would not warrant review by this Court. See, *e.g.*, *Bishop* v. *Wood*, 426 U.S. 341, 345-346 & n.10 (1976).

960 F.2d 1265, 1269 (4th Cir. 1992); *Advanced Medical, Inc.* v. *Arden Medical Systems, Inc.*, 955 F.2d 188, 195 (3d Cir. 1992); see also *Hubacek* v. *Ennis State Bank*, 317 S.W.2d 30, 32 (Tex. 1958) (parol evidence rule is not a rule of evidence, but a rule of substantive law); *Quitta* v. *Fossati*, 808 S.W.2d 636, 642 (Tex. Ct. App. 1991) (same).

2. Petitioners next argue (Pet. 6-7) that the FDIC failed to meet its initial burden of proof under Rule 56(c), Fed. R. Civ. P., to show the absence of any genuine issue of material fact. In particular, petitioners argue (Pet. 6) that the FDIC failed to provide any evidence that the fraudulent inducement alleged by petitioners did not occur. The problem with that argument is that petitioners would have borne the burden of proof on the fraudulent inducement counterclaims at trial. Accordingly, the FDIC had no obligation to negate those claims in its summary judgment motion; rather, the FDIC was obligated to support its affirmative claims, while petitioners were obligated to support their affirmative defenses and counterclaims. See *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-323 (1986). As the lower courts explained, none of the evidence submitted by petitioners on their counterclaims was relevant under the applicable Texas law. Accordingly, it was appropriate for the district court to grant summary judgment for the FDIC.

3. Petitioners also contend (Pet. 7-8) that fraud in the inducement is a valid defense to enforcement of a contract under Texas law and that the affidavits petitioner submitted raised a genuine issue of material fact on that question. Petitioners fail to

address—much less refute—the court of appeals' conclusion that under Texas law a party can establish fraud by means of parol evidence only if it makes a preliminary showing of trickery, artifice, or device. Pet. App. A5. Because petitioners failed to make any showing of trickery, artifice, or device, evidence of an oral representation that the loan would be renewed could not be adequate to establish a genuine issue for trial. Had there been adequate allegations of trickery in addition to the evidence of the oral representation, petitioners would have been entitled to a trial on the questions whether the FDIC in fact used trickery and whether oral representations had been made that fraudulently induced petitioners to execute the forbearance agreement. But because petitioners did not make the requisite allegations, summary judgment for the FDIC was appropriate.

4. Petitioners also argue (Pet. 8-9) that the district court erred by not viewing the evidence in the light most favorable to petitioners and by not indulging every reasonable inference in their favor. Petitioners fail to specify what evidence should have been viewed differently by the district court and what inferences should have been drawn in their favor. Moreover, the petition provides no indication that the district court's actions in that regard raise any legal question of general significance.

5. Petitioners also contend (Pet. 9) that the district court erred in granting the FDIC summary judgment on their counterclaims because the FDIC's summary judgment motion did not address the counterclaims. In fact, the FDIC's motion (reprinted at Pet. App. B1-B6) addressed petitioners' counter-

claims at length. *Id.* at B2-B6 (¶¶ 4-10). In particular, the FDIC argued that "each and every claim and cause of action asserted by [petitioners] in their counterclaims filed with this Court * * * have been released, settled, discharged and forever barred from assertion. FDIC and [Continental] are entitled to judgment of this Court so providing." *Id.* at B4 (¶ 8).[3]

Finally, although petitioners do not present it as a separate question, they contend (Pet. 9) that the district court erred in treating the FDIC's affirmative claims for recovery on the note separately from petitioners' challenge to the validity of the forbearance agreement. That contention is meritless. Petitioners' arguments that the forbearance agreement was invalid offered no reason to doubt the validity of the underlying note and guaranty (which had been executed several years before the forbearance agreement). Accordingly, it was entirely proper for the district court to consider the enforceability of the note and guaranty separately from that of the forbearance agreement. In any event, because both of the lower courts rejected petitioners' challenge to the forbearance agreement, the question whether the challenge would have invalidated the note if it had succeeded is only hypothetical.

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[3] To the extent petitioners attempted to rebut the FDIC's motion for summary judgment by asserting that the forbearance agreement had been fraudulently induced, the FDIC's subsequent pleadings contested that assertion, which could not have been contested until petitioners first raised it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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